Charles Anthony Santiago v Suruhanjaya Pilihan Raya, Malaysia & Anor

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NO 25–16–02 OF 2013
VERNON ONG J
28 MARCH 2013

Election — Election Commission — Electoral roll — Whether Election Commission could be compelled by court to revise electoral roll once notice of certification or recertification of same had been gazetted — Whether publication in Gazette rendered electoral roll final and binding — Whether court's jurisdiction to question, review, quash or set aside electoral roll ousted — Elections Act 1958 s 9A

The applicant in the instant judicial review application sought a mandamus order directing the first and second respondents to revise the principal and supplementary electoral roll for the fourth quarter of the year 2012 and an order that they answer and give an explanation to issues he had raised in a letter to the second respondent. Inter alia, the applicant contended that the respondents had acted unlawfully in failing to remove the names of phantom voters from the electoral roll particularly with regard to the Klang parliamentary constituency.

Held, dismissing the application:

(1) Pursuant to s 9A of the Elections Act 1958, once the electoral roll had been gazetted, the court's jurisdiction to question or review the same was ousted. The principal electoral roll for 2012 had been recertified and notice of the recertification was published in the *Gazette* on 7 June 2012. The supplementary electoral roll for the fourth quarter of 2012 was certified and notice of the certification was published in the *Gazette* on 22 February 2013. The constituency of P 110 (Klang) fell within that electoral roll (see paras 26–27).

(2) If the relief sought by the applicant was granted it was tantamount to the court commanding the respondents to review the electoral roll in question. This was clearly prohibited by s 9A. The court had no jurisdiction to consider the application (see para 28).

(3) The prayer to direct the respondents to answer and give an explanation to the applicant's letter was in the nature of mandamus. For mandamus to issue against the respondents it had to be shown that they had a duty under the law to answer or reply that letter. There was nothing in the Elections Act 1958 that imposed a duty or obligation on the respondents

to answer any letters addressed to them. As such the application for judicial review was without foundation and was frivolous and vexatious (see paras 29, 31 & 32).

[Bahasa Malaysia summary

Pemohon di dalam permohonan semakan kehakiman ini memohon perintah mandamus mengarahkan responden pertama dan kedua untuk menyemak semula daftar pemilih utama dan tambahan untuk suku keempat bagi tahun 2012 dan perintah bahawa mereka menjawab dan memberi penjelasan kepada isu-isu yang dibangkitkannya di dalam surat kepada responden kedua. Antara lain, pemohon berhujah bahawa responden-responden telah bertindak menyalahi undang-undang kerana gagal untuk membuang nama-nama pengundi hantu daripada daftar pemilih terutamanya berkaitan kawasan pilihan raya Parlimen Kelang.

Diputuskan, menolak permohonan:

(1) Berikutan s 9A Akta Pilihan Raya 1958, apabila daftar pemilih diwartakan, bidang kuasa mahkamah untuk mempersoalkan atau menyemak semula perkara ini disingkirkan. Daftar pemilih utama untuk 2012 telah disahkan semula dan notis perakuan semula tersebut diterbitkan di dalam *Warta* pada 7 Jun 2012. Daftar pemilih tambahan untuk suku keempat 2012 disahkan dan notis perakuan diterbitkan di dalam *Warta* pada 22 Februari 2013. Kawasan pilihan raya P 110 (Kelang) terangkum dalam daftar pemilih tersebut (lihat perenggan 26–27).

(2) Jika relief yang dipohon oleh pemohon diberikan ia adalah merupakan seperti mahkamah mengarahkan responden-responden menyemak semula daftar pemilih yang dipersoalkan tersebut. Ini jelas dilarang oleh s 9A. Mahkamah tidak mempunyai bidang kuasa untuk mempertimbangkan permohonan tersebut (lihat perenggan 28).

(3) Permohonan untuk mengarahkan responden-responden menjawab dan memberi penjelasan kepada surat pemohon adalah bersifat mandamus. Untuk mandamus dikeluarkan terhadap responden-responden ia mestilah ditunjukkan bahawa mereka bertanggungjawab di bawah undang-undang untuk menjawab surat tersebut. Tidak terdapat apa-apa di dalam Akta Pilihan Raya 1958 yang mengenakan kewajipan atau tanggungjawab ke atas responden-responden untuk menjawab apa-apa surat yang dialamatkan kepada mereka. Oleh itu permohonan untuk semakan kehakiman adalah tanpa asas dan remeh dan menyusahkan (lihat perenggan 29, 31 & 32).]

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, CA (refd)

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228, SC (refd)
B Surinder Singh Kanda v The Government of the Federation of Malaysia [1962] 1 MLJ 169, PC (refd)
Ho Kooi Sang v Universiti Malaya [2004] 2 MLJ 516; [2004] 5 CLJ 445, HC (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)
Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, SC (refd)
Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493, CA (refd)
Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (refd)
Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)
Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507, CA (refd)
Muhammad Sanusi Md Nor v Mohd Tajuddin Abdullah & Yang Lain [2008] MLJU 570; [2009] 1 CLJ 1, FC (refd)
Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2000] 2 AMR 2265, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 1, FC (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390, HC (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289; [1988] 3 CLJ 85, CA (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)
Thein Tham Sang v United States Army Medical Research Unit & Anor [1983] 2 MLJ 49, FC (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442; [1995] 3 CLJ 627, SC (refd)
Workon Sdn Bhd v The Director of Lands & Survey, Sabah [1999] 4 MLJ 177, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2)
Elections (Registration of Electors) Regulations 2002 regs 10, 13, 25
Elections Act 1958 s 9a

Federal Constitution Part II
Rules of Court 2012 O 53 rr 2(2), 2(4), 3(2), 3(6)
Specific Relief Act 1950 s 44

John Fam (Freda Santhiago (SN Fam & Co) for the applicant.
Suzana Atan (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Vernon Ong J:

[1] In this application for judicial review, the applicant is seeking leave of the court for the following orders:

(a) an order of mandamus directing the Election Commission Malaysia ('the first respondent') and the Chairman of the Election Commission Malaysia ('the second respondent') to carry out their powers conferred by law to revise the Principal and Supplementary Electoral Roll for the Fourth Quarter of 2012;

(b) an order that the respondents are to perform their powers under the existing laws, amongst others regs 10, 13 and 25 of the Elections (Registration of Electors) Regulations 2002; and

(c) an order directing the respondents to answer and give explanations to the issues raised in the letter by the applicant dated 21 December 2012 addressed to the second respondent.

JUDICIAL REVIEW IN MALAYSIA

[2] Judicial review is a branch of law dealing with administrative law. In its traditional sense, it refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The decisions are tested against established principles developed over time by the common law (see recent decision of the Court of Appeal in *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507).

[3] The powers of the High Court of judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964'); in particular the additional powers which are set out in para 1 of the Schedule to s 25(2) of the CJA 1964. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution. In fact, an application for judicial review may include a prayer for a declaration (O 53

r 2(2) of the ROC 2012). In the context of an application for judicial review of a decision of an inferior tribunal or statutory body, the court is usually called upon to make an order for mandamus, prohibition or certiorari. An order of certiorari has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any ultra vires exercise of powers. An order of mandamus is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular act or duty mandated by law; or put simply, it is used often to command public officers to perform their public duties (see s 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them.

Distinction between public law proceedings and private law proceedings

[4] Underlying the distinct nature of an application for judicial review is the requirement in Malaysian common law to have regard to the interest of good administration. In order to appreciate this concept, it is essential to draw a distinction between public law proceedings and private law proceedings.

[5] In private law proceedings, it is the parties alone who are directly concerned with the outcome of the litigation. The public at large are not usually interested in the outcome. Be that as it may, the public as a whole are concerned only that private law proceedings should provide a fair and efficient manner of resolving disputes between individuals and of enforcing the rights of one individual over another.

[6] In contrast, public law proceedings usually affect many members of the public or even the public at large as well as the parties to the proceedings (eg, decisions of public bodies concerning *Orang Asli* native land rights, environment issues, planning permission, public nuisance, etc). Other members of the public will be interested to a lesser extent, whether financial or otherwise. However, there are also public law proceedings which do not usually affect the members of the public. A common example of this involves a person's application to quash the decision of the Industrial Court dismissing his claim for reinstatement on the ground of unlawful dismissal. In these cases, the court will be largely, if not exclusively, concerned with the merits of the application alone. Both sets of proceedings are treated as public law proceedings because the decision is taken by a public body performing a public duty. Typically, the public bodies qua respondents in an application for judicial review would be the Ministry of Human Resource, Minister of Home Affairs, Registrar of Societies, State Executive Council, Registrar of Land and Mines, BURSA Malaysia, Securities Commission, Government departments (such as Immigration, Royal Customs, Royal Malaysian Police), tribunals (such as Housing Tribunal, Consumer Claims Tribunal), statutory bodies (Malaysian

Medical Council, Lembaga Akitek Malaysia), Service Commissions, Director General of Inland Revenue and the Election Commission, to name a few.

[7] As a general rule, the court has to take into account not only the interests of the applicant and the respondent but also the interests of the public as a whole in good administration.

[8] Judicial review is therefore primarily concerned with enforcing public duties on behalf of the public as a whole. In this sense, the court's concern with vindicating the interests of the individual is part of the process of ensuring that public bodies do not act unlawfully and that they do perform their public duties.

PRINCIPLES OF JUDICIAL REVIEW

[9] At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. (*Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305). The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of certiorari where (a) that body has acted without jurisdiction; or (b) that body has exceeded its jurisdiction; or (c) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (d) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense. In short, whether certiorari will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made ultra vires, unfairly or unjustly in the exercise of the discretion. In dealing with this application for judicial review there are fundamental principles to be applied within regard the principles enunciated by the Court of Appeal in a case involving a judicial review of an award of the Industrial Court are instructive. In *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493 (CA) at p 511 Mohd Ghazali JCA (later FCJ) said:

> From the authorities discussed above, I would think that *in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind:*

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(i) *judicial review is not an appeal from a decision but a review of the matter in which the decision was made;*

(ii) *the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;*

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(iii) *the High Court through judicial review, should not introduce technicalities of the court of law* to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of the case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

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(iv) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;

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(v) *the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;*

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(vi) *the High Court will not interfere with findings of fact by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.* (Emphasis added.)

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[10] Against the backdrop of the Court of Appeal's decision in *Menara PanGlobal Sdn Bhd v Ariokianathan a/l Sivapiragasam*, in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 (FC) the Federal Court held that the distinction between review and appeal no longer holds. The principles to which a reviewing court should scrutinise included the following matters:

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(a) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;

(b) the merits where the decision is grounded on illegality or plain irrationality;

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(c) the findings where the facts do not support the conclusion arrived at by a tribunal; or

(d) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration.

[11] Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go into the merits or otherwise of a decision during a judicial review application (*Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 (FC); *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 (FC)).

[12] In the light of the above cited authorities, it is settled law that there are three principal grounds upon which a court may review a decision of an inferior tribunal or statutory body. They are:

(a) procedural impropriety;

(b) illegality; and

(c) irrationality.

Procedural impropriety

[13] This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v The Government of the Federation of Malaysia* [1962] 1 MLJ 169; *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; [1988] 3 CLJ 85 (CA); *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390).

Illegality

[14] This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and

anisminic error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 1). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by mala fide. The decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2000] 2 AMR 2265).

Irrationality

[15] Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the 'procedural propriety' test). The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

[16] A decision which falls on this ground is said to have failed the *'Wednesbury unreasonableness' test* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor v Zaid bin Haji Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*).

Requirement for leave to make an application for judicial review

[17] Be that as it may, it is trite that, an application for judicial review must be preceded by an application for leave to make the application for judicial review. What this means is that the applicant cannot apply for judicial review

unless he has first obtained the 'leave' (permission) of the court. An application for leave must also be made within three months from the date the impugned decision coming is communicated to the applicant. The requirement is embodied in the O 53 r 3(6) of the ROC 2012.

[18] In essence, the requirement for leave act as a safeguard against its abuse built into the judicial review. It also serves as a useful filter against frivolous or vexatious applications. It ensures that the court exercises its discretion only to deal with the obvious cases where, whatever the merits, the court should not intervene as when there is an alternative and better remedy or because there has been excessive delay. Thirdly, it also serves to reduce as far as is consistent with the court's role of reviewing administrative action, the interference to which public bodies are subject.

[19] As a prerequisite, the applicant must satisfy the court that he has the locus standi to file the judicial review application; and in order to do so, he has to show that he is a person who is adversely affected by the decision (O 53 r 2(4) of the ROC 2012).

[20] It is settled law that before the court can exercise its discretion in granting leave, it must be satisfied that there is an arguable case. The onus is on the A to show the court that there is an arguable case. What is the distinction between the words 'arguable case' and 'a prima facie case'?

[21] As a general rule, a litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can overthrown only by rebutting evidence adduced by the other side (*Mosely and Whitely's Law Dictionary*, (11th Ed)). Put another way, prima facie evidence is evidence which, if accepted, appears to be sufficient to establish a fact unless rebutted by acceptable evidence to the contrary. Therefore, in itself, prima facie evidence is not conclusive.

[22] However, the threshold for making out an arguable case is much lower than that for making out a prima facie case. An arguable case is made out if an applicant can show that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application (*Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 (FC)).

[23] In performing its task at the leave stage, before the court grants relief it must be satisfied that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such arguments as is necessary on the law (see *Tuan Hj Sarip Hamid & Anor v Patco*

Malaysia Bhd [1995] 2 MLJ 442; [1995] 3 CLJ 627 at p 636 (FC)) it is required to ask itself the question of whether justice requires the decision or action of the administrative or public body to be quashed or otherwise interfered with by the courts. If looking at the situation as a whole there has been unfairness then the court must interfere unless there is very good reason for not doing so. On the other hand, if there is, or has been some procedural error but the result is not unjust or unfair then the court in its discretion should be ready to refuse relief. Invariably, there are a multitude of considerations which will point in different directions in each case. In short, an applicant had to show that there were some error on the face of the record or some jurisdictional error.

GROUNDS OF THE APPLICATION

[24] The three principal grounds of the application as stated in the applicant's statement pursuant to O 53 r 3(2) of the ROC 2012 may be summarised as follows:

(a) that the respondents acted unlawfully by failing to expunge the names of voters from the electoral roll;

(b) that the respondent acted unlawfully by failing to consider relevant facts and/or failing to give consideration to the following facts:

(i) the registered voters whose address is at 994, Jalan Papan, Pandamaran, Klang are phantom voters because they are not residents of that address; and

(ii) that the said voters alleged to have used the said address when they were squatters near No 994 do not exist.

(c) that the respondents failed to answer or give any explanation to the issues raised in the letter by the applicant dated 21 December 2012 to the second respondent.

DECISION OF THE COURT

[25] In prayers (a)–(b) of this application, the applicant is seeking an order of mandamus to command the respondents to revise the Principal and Supplementary Electoral Roll for the Fourth Quarter of 2012.

[26] It is not in dispute that the Principal Electoral Roll for 2011 has been re-certified and the Supplementary Electoral Roll for the First Quarter, Second Quarter, Third Quarter and Fourth Quarter for 2012 has been certified and *gazetted*. The Principal Electoral Roll for year 2012 has been re-certified vide

PU(B) 197/2012 dated 7 June 2012. The Supplementary Electoral Roll for the Fourth Quarter for year 2012 has been certified vide PU (B) 61/2013 dated 22 February 2013. The constituency of P 110 Klang falls within this electoral roll.

[27] According to s 9A of the Elections Act 1958 once the electoral roll has been gazetted the court's jurisdiction to question or review the same is ousted. Section 9A is as follows:

> Section 9A
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> After an electoral roll has been certified or re-certified, as the case may be, and notice of the certification or re-certification has been published in the *Gazette* as prescribed by regulations, made under this Act, the electoral roll shall be deemed to be final and binding and shall not be questioned or appealed against in, or reviewed, quashed or set aside by, any court.

In *Muhammad Sanusi Md Nor v Mohd Tajuddin Abdullah & Yang Lain* [2009] 1 CLJ 1 the Federal Court held that pursuant to s 9A once the electoral roll is certified or re-certified and subsequently *gazetted*, the electoral roll is final and cannot be questioned in any court.

[28] In this instance, if the relief sought by the applicant is granted, then it is tantamount to the court commanding the respondents to review the electoral roll in question. This is clearly prohibited by s 9A. This court has no jurisdiction to consider an application of this nature.

[29] Prayer (c) calling for the respondents to answer and give explanations to the applicant's letter is in the nature of a mandamus. In order for an order for mandamus to issue requiring a public officer to perform any specific act, five conditions to be satisfied (see s 44 of the Specific Relief Act 1950 reproduced below):

> S44(1)
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> A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or temporary nature, or by any corporation or any court subordinate to the High Court:
>
> Provided that
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
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> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

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(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

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[30] The five conditions are cumulative; that means that all the five conditions must be satisfied in order for the court to issue an order for mandamus (*Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b; *Thien Tham Sang v United States Army Research Unit & Anor* [1983] 2 MLJ 49; *Workon Sdn Bhd v The Director of Lands & Survey, Sabah* [1999] 4 MLJ 177; *Ho Kooi Sang v Universiti Malaya* [2004] 2 MLJ 516; [2004] 5 CLJ 445).

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[31] In order for an order for mandamus to issue against the respondents, it must be shown that the respondents have a corresponding duty to answer or reply to the letter. To adopt the words of Sharma J in *Koon How Chow*, there must be under the law some duty cast upon the public officer.

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[32] In *MP Jain Administrative Law of Malaysia and Singapore* (3rd Ed), at p 653, it is stated:

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> Mandamus can be granted only when (i) a legal duty is imposed on an authority, and it does not perform the same; and (ii) the applicant has a legal right to compel the performance of the public duty prescribed by law. Mandamus is thus a very wide remedy which is available against a public officer to see that he does his duty, or act according to law.
>
> What can be enforced through mandamus is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the authority concerned. Thus, if an officer has power, rather than a duty, and if he does not use his power, mandamus is not issued to compel him to exercise his powers.

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In this instance, there is nothing in Elections Act 1958 imposing an obligation or duty on the respondents to answer any letters addressed to them. In other words, there is no legal duty imposed on the respondents to answer any letters. Since there is no legal duty to perform, the application for judicial review is clearly without foundation.

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[33] For the foregoing reasons, the court finds that the applicant has failed to make out as arguable case; accordingly, the application is frivolous and vexatious.

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[34] In the result, the application must be dismissed.

Application dismissed.

Reported by Ashok Kumar